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Chair: Mr. Wiwen-Nilsson (Vice-Chair) ..... (Sweden)

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Mr. Wiwen-Nilsson (Sweden), Vice-Chair, took the Chair.

The meeting was called to order at 3.15 p.m.

Finalization and adoption of a Guide to the Enactment of the UNCITRAL Model Law on Public Procurement (*continued*) (A/CN.9/XLV/CRP.1/Add.2)

1. **The Chair** drew attention to document A/CN.9/XLV/CRP.1/Add.2 which had just been distributed and invited the members of the Commission to familiarize themselves with its contents.

The meeting was suspended at 3.20 p.m. and resumed at 3.45 p.m.

Future work in the area of public procurement and related areas (*continued*) (A/CN.9/755)

2. **Ms. Nicholas** (Secretariat) said that paragraphs 38 and 39 of the note by the secretariat on possible future work in the area of procurement and infrastructure development (A/CN.9/755) raised questions about how to ensure that the Model Law was widely enacted, implemented and interpreted, and also about the use of modern communication methods to publicize UNCITRAL material that supported the Model Law. The secretariat wished to determine how much flexibility there was within the United Nations publications operation for interactive and user-friendly versions of the Guide and other subsequent papers.

3. Several delegations had suggested specific topics, such as suspension and debarment, and procurement planning, which could be dealt with in supplementary papers. However, a more systematic approach might be required in order to identify appropriate areas and the Commission might consider that, without a better understanding of what publications other bodies in related fields might be working on, it would be premature to take too many specific steps.

4. **Mr. Imbachi Cerón** (Colombia) said that he would be interested to hear the secretariat's opinion regarding his delegation's proposal regarding competition in public procurement. Electronic public procurement mechanisms had created problems for some companies with limited technological capabilities. Thus, it would be important for the Commission to develop a mechanism that could be used by the public and the private sector to establish policies to prevent unfair competition prior to the award of contracts.

5. Colombia continued to support the work of UNCITRAL in other areas, but considered that regulating competition was extremely important. A definite policy could give assurances to companies that they were all competing under the same conditions.

6. **Mr. Loken** (United States of America), referring to the dissemination of the Model Law, said that he wished to call the secretariat's attention to the Global Information Network (GLIN), a project of the United States Library of Congress. Its ambition was to be a comprehensive and universally accessible online collection of treaties, statutes, regulations, judicial decisions and principal secondary materials. The Network was currently trying to establish a base in every country, usually within the national legislature. It might be possible for UNCITRAL to involve domestic institutions in its work as a means of augmenting its internal capacity.

7. **Mr. Fruhmann** (Austria) said that the secretariat might consider bilateral agreements with institutions in different enacting States that would provide information on public procurement and relevant jurisprudence, thus creating a network of States where the Model Law was being implemented so as to provide feedback to guide revisions of the Law and future work.

8. The idea that the Guide to Enactment should be a work in progress that could be updated and enriched through the Internet could contribute real added value, and he asked what its status was.

9. **The Chair** said that a network of Governments in connection with the Case Law on UNCITRAL Texts (CLOUT) was already in existence and provided information about the Model Law and other issues. Also, the draft decision adopting the Guide to Enactment (A/CN.9/XLV/CRP.2) provided for feedback and updating of the Guide, as mentioned by Austria.

10. **Mr. Wang** (Norway) said that he agreed that any future work in the area of public procurement should take into account other international instruments relevant to that particular area, including the existing and future initiatives of the European Union.

11. Norway supported the idea that the topics of sustainability and environmental issues should be considered, either among the proposals for additional work on public procurement not addressed in the Model Law, or in any other appropriate manner.

12. **Mr. Zhao** Yong (China) said he supported the ideas proposed by Colombia. Furthermore, it was very difficult for developing countries to know which method of procurement to use in each specific case. Therefore, as part of its future work, UNCITRAL should study the costs and benefits of, and the infrastructure needed for, each procurement method in order to provide guidance to developing countries.

13. **Ms. Leblanc** (Canada) said that the secretariat had noted that the 2011 Model Law would rarely be enacted without some sort of tailoring to local circumstances, but local circumstances were not unique, and States frequently shared very similar legal frameworks. UNICTRAL staff were frequently asked to provide technical assistance to States with regard to enactment, and it would be useful to know whether the report of their work could be published so that best practices could be shared among States with similar legal frameworks.

14. **The Chair** said that it was emerging from the discussions that member States would be interested in receiving information on the experiences of others in implementing the Model Law and it might be useful to hear the secretariat's views on how that aspect could be undertaken.

15. **Mr. Loken** (United States of America) said that the United States Institute of Peace (USIP) had a programme relating to security, police work and the rule of law. Its main product was a collection of best practices on a global scale, which appeared to be very similar to the idea being discussed

16. Regarding future work, some years earlier UNCITRAL had organized a colloquium on commercial fraud and the misuse of UNCITRAL instruments. However, the topic had not been assigned to a working group and he was unaware of the results.

17. **The Chair** said that the results of the colloquium had been indicators of commercial fraud, which could be of interest to members of the Commission as reference material. However, delegations should keep in mind that UNCITRAL focused on law, and some proposals possibly exceeded its mandate and resources.

18. **Mr. Sorieul** (Secretary of the Commission) said that UNCITRAL naturally wanted its work to be disseminated as widely as possible. Some excellent ideas had been put forward, which would require the secretariat to undertake new activities and provide various types of services. The secretariat was also expected to provide follow-up on previous work, while preparing future work; as time went by, an increasing number of texts required more extensive dissemination and implementation. The secretariat's capacity was, however, limited. In 2012, the secretariat was the same size and had the same resources as in 1968 when it had been set up.

19. The CLOUT system compiled case law in the six languages of the United Nations and the limits of the secretariat's capacity in that respect had been reached. It would be useful if the States themselves would contribute to the compilation of case law on procurement. The secretariat would still require additional resources at the stage of disseminating the information in the form of a summary of case law.

20. **Ms. Mokaya-Orina** (Kenya) said that the Model Law had formed the bedrock for procurement reform in many countries including her own; nevertheless, it needed to be updated to cover certain issues, such as electronic communication in public procurement.

21. **Mr. Mugasha** (Uganda) said that, although the Commission was currently dealing with public procurement, interest had been expressed in areas such as microfinance and international contracts. The different proposal would have to be assessed in order to establish priorities and it would be useful to know when the Commission would undertake such an exercise.

22. **Mr. Wallace** (United States of America) said that some of the additional topics relating to procurement set out in document A/CN.9/755 did not lend themselves readily to treatment in the Model Law and it was not practical to reopen the issue at the current stage. Several delegations had expressed great interest in continuing to work in specific areas that they considered of value to their own and other countries, and the secretariat could perhaps undertake certain work in the area of procurement that would address those concerns.

23. As to various issues relating to public-private partnerships (PPP) and privately financed infrastructure (PFI), there appeared to be broad interest in pursuing work in that area. A colloquium might be held to identify work that UNCITRAL might usefully undertake in that regard. If the Working Group were to be asked to undertake further work in that area, it would need a clear mandate.

The meeting was suspended at 4.35 p.m. and resumed at 4.55 p.m.

24. **The Chair**, summarizing the discussion, said that when deciding on future work, it should be recalled that the UNICTRAL mandate related to legal matters and products. That said, there appeared to be a common view that work should continue on PPP/PFI issues, the scope of such work to be defined by a colloquium.

25. The Commission had also expressed a desire to gather information on the implementation of the Model Law and any problems that might be encountered, and to make such information accessible to States through UNCITRAL. However, there was a limit to what UNICTRAL could do and the Commission should not underestimate the resources required to perform that task.

26. As to specific aspects of the Model Law, such as the costs and benefits of using certain methods of procurement, and sustainability or sustainable procurement, while the Commission had expressed interest in considering such topics, there were limitations imposed by resource constraints and the UNCITRAL mandate. The United Nations International Development Organization was examining the socioeconomic aspects of sustainability and was better placed to do so.

27. In conclusion, regarding future work, the secretariat should be instructed to make preparations for a colloquium, in consultation with members, which would provide the basis for a decision by the Commission in 2013 on the content and scope of its future work. In relation to the collection and dissemination of information on the implementation of the Model Law, the secretariat should be instructed to examine the matter and define what was feasible in terms of resources, and experience gained from the CLOUT system.

28. Consequently, the Commission would not consider contract management or procurement planning. Although suspension and debarment could be seen as a follow-up to the Model Law, it was not the moment to undertake new work aimed at adding to or amending the Model Law. Lastly, sustainability could not be considered a legal issue.

29. **Ms. Nicholas** (Secretariat) asked whether the secretariat should assess whether some of the topics that would not be included as future work on the Model Law might be addressed in a paper, and ascertain whether relevant documentation had been prepared by other organizations working in the area.

30. **The Chair** said that he understood that the secretariat should not be preparing papers, but merely collecting and disseminating information concerning the Model Law and its implementation.

31. **Mr. Wallace** (United States of America) said that, for many years, the possibility of preparing papers had been before the Working Group and had never been rejected, although it had never been discussed at length. The obvious constraint was lack of resources and it was therefore an issue of resource allocation within the secretariat. It appeared that, based on the interest expressed by China, Colombia and Norway, cost/benefits, sustainability and competition were important topics. They should not be ruled out entirely, but their relative merit should be weighed and a determination should be made as to whether they fell within the UNCITRAL mandate.

32. **The Chair** said that the mandate of UNICITRAL was not to delve into issues such as costs/benefits and sustainability; rather, its efforts should focus on the Model Law.

33. **Ms. Nicholas** (Secretariat) said that the secretariat might look at what was available on such topics and report back to the Commission, which could then decide whether sufficient guidance existed in specific areas.

34. **Mr. Wallace** (United States of America) said that the work of the Office of Technology Assessment of the United States Congress could provide a useful example, as it did not do original research, but assessed the value of existing research in order to advise Congress.

35. **The Chair** said that if there were no objections to summary of the discussion, he would take it that the Commission wished to adopt the conclusions set out in it.

36. *It was so decided.*

Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law on Public Procurement (*continued*) (A/CN.9/XLV/CRP.1/Add.1 and CRP.2)

37. **Mr. Mugasha** (Uganda), Rapporteur, introducing the section of the draft report on agenda item 4 (A/CN.9/XLV/CRP.1 and Add.1 and 2), said that it summarized the Commission's consideration of proposals for the Guide to Enactment of the UNCITRAL Model Law on Public Procurement and focused on the decisions taken.

38. **Mr. Wallace** (United States of America), noting the use of "more user-friendly" in both paragraph 1 of

A/CN.9/XLV/CRP.1/Add.1 and paragraph 19 of addendum 2, asked whether a more general observation could be made.

39. **Ms. Nicholas** (Secretariat) said that at an early stage in the deliberations, it had been stated that the Commission would return to the issue of ensuring user-friendliness. So the simplest solution would be to eliminate the first reference, and to leave paragraph 19 of addendum 2 unchanged.

40. **Mr. Wallace** (United States of America) said that paragraph 2 stated that the Commission had "approved the text of the draft Guide contained in document A/CN.9/WG.1/WP.79", which suggested that it had approved the entire draft Guide, whereas the Commission had only approved that document, but not the 19 addenda. He suggested that the text should be amended to read "approved that part of the text of the draft Guide contained in ..."

41. **Ms. Nicholas** (Secretariat) said that the secretariat understood that the terminology should be consistent throughout the report. Therefore, each addendum would refer to "that part of the text ...".

42. **Mr. Fruhmann** (Austria) said that paragraph 3 (c) stated that "collusion would probably violate the law of the State", but should read "collusion would violate the law of the State". Subparagraph (e), which referred to a point raised by Austria, stated that "the procuring entity's complicity in collusion was not uncommon". However, to be technically correct, it was not the procuring entity, which was the State, but rather the State's representatives that might be in collusion with the bidder. Thus the subparagraph should read: "the complicity in collusion of the representatives of the procuring entity is not uncommon".

43. **Mr. Wallace** (United States of America) said that the second sentence of paragraph 9 needed redrafting in order to ensure greater accuracy. He proposed that it be amended to read: "... electronic reverse auctions would be included, analogous to the discussion of the potential advantages of using centralized purchasing agencies ...", thereby eliminating the reference to subparagraph 4 (a). Reference should be made to "in subparagraphs 4 (g) and (i)", since they were the only ones relevant to the discussion.

44. **The Chair** said that subparagraph 4 (a) had been mentioned by Austria and the reference to it should therefore not be eliminated.

45. **Mr. Wallace** (United States of America) said that his observations referred to drafting problems. The reference to administrative efficiency in 4 (a) was not about third party advisers, but rather the administrative efficiency of centralized purchasing.

46. **Ms. Nicholas** (Secretariat) proposed that the paragraph could be amended to read "analogous to the discussions of administrative efficiency in subparagraph 4 (a) and the potential advantages in using centralized purchases under the other subparagraphs".

47. **Mr. Fruhmann** (Austria) requested clarification of how paragraph 8 would be worded in view of the observations on paragraph 2.

48. **Ms. Nicholas** (Secretariat) said that the current instructions were that the secretariat should redraft paragraph 2 to read: "The Commission approved that part of the text of the draft Guide contained in document A/CN.9/WG.I/WP.79". In addition, for the sake of consistency and to avoid any misunderstandings, paragraph 8 would be revised to read: "The Commission approved that part of the text of the draft Guide contained in document A/CN.9/WG.I/WP.79/Add.10."

49. **Mr. Zhao** Yong (China) said that the words "electronic reverse auctions" and "auctions" had been used interchangeably in paragraph 9, and the text should be amended in line with paragraph 17 of addendum 2, which correctly reflected the concerns expressed by the Chinese delegation.

50. *A/CN.9/XLV/CRP.1/Add.1, as orally amended, was adopted.*

51. **Mr. Wallace** (United States of America) requested clarification regarding paragraph 3 of A/CN.9/XLV/CRP.1/Add.2.

52. **Ms. Nicholas** (Secretariat) said that, if members found the wording to be too obscure, it could be amended to read: "The Secretariat was instructed to ensure consistency in the discussion of similar issues throughout part III of the Guide, ensuring that the relative emphasis on the constituent elements remained the same throughout."

53. **Mr. Wallace** (United States of America) asked for clarification regarding the phrase "avoid the use of the word 'author' when amending paragraph 29" in paragraph 4 (d).

54. **Ms. Nicholas** (Secretariat) said that the instruction had been to use the term "issuers of documents" or some similar term.

55. **Mr. Wallace** (United States of America) said that the last sentence of paragraph 5 described what seemed to him to be a rather ambitious task and he asked for some clarification.

56. **Ms. Nicholas** (Secretariat) said that Colombia had raised the issue of adapting the Model Law to local circumstances. She suggested that the text be amended to read: "The Commission also confirmed that the discussion in the Guide should remain ...".

57. **Mr. Grand d'Esnon** (France) said that paragraph 6 (a) might be interpreted to mean that the Model Law authorized a State not to uphold international standards.

58. **Ms. Nicholas** (Secretariat) said that the English version would be revised to read: "... risks violating free trade commitments".

59. **Mr. Zhao** Yong (China) said that the last sentence of paragraph 8 expressed only one of the purposes of tender security, the main purpose of which was to reduce the risk of tendering and to avoid irresponsible bids. The purpose of the performance guarantee was to allay concerns as regards the qualification and capacities of the supplier.

60. **Ms. Nicholas** (Secretariat) said that the text would be amended to read "one purpose of tender security ...".

61. **Mr. Wallace** (United States of America) said that the phrase "the Guide would state clearly that requiring tender security should not be considered the norm" appeared to be somewhat stronger than the position emerging from the discussion.

62. **The Chair** said that the report was supposed to reflect the actual conclusions reached, and the Commission had concluded that tender security "should not be the norm".

63. **Mr. Wallace** (United States of America) said that paragraph 11 did not accurately reflect the Commission's position and should be amended accordingly. Noting that paragraph 19 stated that "the Commission approved the remaining parts of the Guide", he asked whether the Commission had to take any further legal action in that regard.

64. **Ms. Nicholas** (Secretariat) said that the text in paragraph 19 was required for the formal adoption of the Guide.

65. **The Chair** said that, since a formal acknowledgement of the work of the secretariat could not be included in the Guide, he wished to place on record the Commission's gratitude to the secretariat.

66. **Mr. Fruhmann** (Austria) said that the first operative paragraph of the draft decision of the adoption of the Guide to Enactment of the UNCITRAL Model Law on Public Procurement (A/CN.9/XLV/CRP.2) should include a reference to addenda 1 to 3, because those documents reflected the deliberations that led to the amendment and finalization of the text.

67. While paragraph 5 endorsed efforts to establish a mechanism for monitoring practices in the use of the Model Law and the Guide, it did not go far enough in envisaging the Guide as a work in progress, which could be continually updated.

68. Lastly, he requested clarification of the reference to "other agencies and mechanisms" in paragraph 6.

69. **Ms. Nicholas** (Secretariat), replying to the representative of Austria, said that the Guide to Enactment would be adopted at the current session and the documents summarizing the Commission's deliberations would be cited. On his second point, updating the Guide would require a further decision by the Commission, which explained the wording used.

70. The manner of dissemination had not been addressed in the draft decision. If the Commission considered that the secretariat should be authorized to arrange for the appropriate means of publication, a provision to that effect should be included in paragraph 2.

71. As to paragraph 6, similar language had been used when the Commission had adopted the Model Law. "Procurement reform agencies" referred to multilateral development banks, the Organization for Economic Cooperation and Development and others, while "mechanisms" included the United Nations Office on Drugs and Crime, the United Nations Convention against Corruption, and other conventions.

72. If the Commission considered that significant redrafting of the proposed text was required, a decision could be postponed to the following day.

73. *It was so decided.*

The meeting rose at 6.05 p.m.